

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

HENRY STREET SUPERIOR DELI CORPORATION :

for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period Mach 1, 2010 through November 30, 2012. :

DETERMINATION
DTA NOS. 826222
AND 826223

In the Matter of the Petition :

of :

NAIFAHMED ABAD :

for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period March 1, 2010 through November 30, 3012. :

Petitioner Henry Street Superior Deli Corporation filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2010 through November 30, 2012.

Petitioner Naifahamed Abad filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2010 through November 30, 2012.

A consolidated hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on April 14, 2015, with all briefs due by September 30, 2015, which date began the six-month period for issuance of this determination. Petitioners appeared by the Antonious Law Firm (Jacqueline S. Kefedjian, Esq., of counsel). The Division of Taxation

appeared by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation (Division) properly determined additional sales and use taxes due from petitioner Henry Street Superior Deli Corporation.

II. Whether penalties imposed under Tax Law § 1145(a)(1)(i) and (vi) should be abated.

III. Whether the notices of determination issued to petitioner Naifahamed Abad should be cancelled based upon petitioner's nonreceipt thereof and based upon the Division's failure to issue a copy to his representative.

FINDINGS OF FACT

1. During the period in issue, petitioner Henry Street Superior Deli Corporation (Henry Street) owned and operated a business in New York, New York, making sales of, among other things, beer, soda, cigarettes, sandwiches, chips, prepared foods, cold cuts, fruits and vegetables, ice cream, cookies, cakes, detergents, and paper products.

2. Petitioner Naifahamed Abad at all relevant times was president and 100% shareholder of Henry Street. Mr. Abad does not contest his status as a person responsible to collect and remit sales and use taxes on behalf of Henry Street.

3. Henry Street was registered as a vendor for sales tax purposes and filed New York sales tax returns for the audit period, March 1, 2010 through November 30, 2012. Henry Street reported the following amounts of gross and taxable sales for the audit period:

Period Covered by Return	Gross Sales Reported	Taxable Sales Reported
March 1, 2010-May 31, 2010	\$107,701.00	\$44,157.00
June 1, 2010-August 31, 2010	\$108,663.00	\$45,645.00
September 1, 2010-November 30, 2010	\$129,746.00	\$51,902.00

December 1, 2010-February 28, 2011	\$124,526.00	\$49,814.00
March 1, 2011-May 31, 2011	\$129,735.00	\$51,898.00
June 1, 2011-August 31, 2011	\$135,284.00	\$54,118.00
September 1, 2011-November 30, 2011	\$138,327.00	\$55,335.00
December 1, 2011-February 28, 2012	\$139,007.00	\$55,605.00
March 1, 2012-May 31, 2012	\$140,039.00	\$57,419.00
June 1, 2012-August 31, 2012	\$145,901.00	\$59,819.00
September 1, 2012-November 30, 2012	\$146,502.00	\$62,997.00

4. By letter dated February 11, 2013, the Division of Taxation (Division) advised Henry Street that a sales tax field audit of its books and records for the audit period would commence on March 12, 2013. This audit appointment letter advised Henry Street that all of its books and records pertaining to its sales and use tax liability for the audit period should be available for review on the audit appointment date. An attached Information Document Request (IDR) specified a detailed listing of particular records that were to be available for the entire audit period, including sales tax returns; worksheets and canceled checks; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; all exemption documents supporting nontaxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules, State Liquor Authority license; lease contracts; utility bills; guest checks; cash register tapes, and capital asset list.

5. On February 12, 2013 the auditor assigned to the audit made a field visit to Henry Street. One cash register was observed. During the visit, the auditor purchased a soft drink and

was told the price was \$1.00. He did not receive a receipt for his purchase and noted that none of the other customers in the business at the time received receipts for their purchases. He also observed that Henry Street sold beer and cigarettes. The auditor also observed five employees during his visit, to wit: two at the register, two at the deli counter, and one in an aisle. He further noted that Henry Street accepted food stamps. In his audit log detailing the visit, he referred to Henry Street as a deli.

6. On February 20, 2013, the Division's auditor received a power of attorney from Attorney Jacqueline Antonious (the representative) appointing her to represent Henry Street. The representative also faxed a power of attorney to the auditor on said date authorizing her representation of Mr. Abad. On February 27, 2013 Ms. Antonious requested that the March 12, 2013 audit appointment be rescheduled to April 2, 2013. The auditor informed the representative that he would reschedule the audit appointment to April 2, 2013 if waivers extending the statute of limitations for assessment were executed. The auditor sent a waiver for Henry Street to the representative. Under the belief that he did not have a power of attorney for Mr. Abad, the auditor mailed a waiver to Mr. Abad's home address.

7. On March 4, 2013, the auditor received a waiver extending the statute of limitations for refund or assessment from Henry Street. For the period March 1, 2010 through November 30, 2010, the period of limitations was extended to December 20, 2013. The auditor did not receive a similar waiver on behalf of Mr. Abad.

8. On April 2, 2013, the auditor received Henry Street's bank statements, an Anheuser-Busch purchase report, a Boar's Head purchase report and a cigarette and candy purchase report. No other records requested in the Division's IDR were provided, including records specifically pertaining to Henry Street's sales.

9. On April 17, 2013, the auditor mailed another IDR requesting virtually the same records as requested in the February 11, 2013 IDR, except for bank statements, a capital asset list and corporate books.

10. On April 30, 2013, the auditor telephoned the representative to inquire as whether more records would be forthcoming. The representative responded that she had not yet heard back from Mr. Abad.

11. By letter dated May 13, 2013, the auditor informed the representative that an observation of Henry Street would take place. In response to the May 13, 2013 letter, the representative indicated that Henry Street did not consent to an observation.

12. Lacking complete books and records to perform a detailed audit, coupled with the inability to perform an observation of Henry Street, the auditor resorted to the use of an indirect audit methodology to estimate gross and taxable sales.

13. To compute audited gross sales the auditor consulted the National Restaurant Association's Restaurant Industry Operations Report (RIOR) for 2010, which was the most recent edition the Division had at the time of audit. Pursuant to this report, the auditor obtained the median quartile occupancy costs of 6.9% for limited service restaurants with a menu theme of sandwiches/subs/deli. Since petitioners did not provide a lease agreement or federal tax returns as requested, the auditor consulted federal tax information contained in the Division's database to obtain the rental expense claimed by Henry Street for the 2010 tax year. The rental expense was divided by the 6.9% occupancy cost to arrive at gross sales of \$3,156,521.74 for the audit period.

14. To compute the ratio of taxable sales to total sales (taxable ratio), the auditor subtracted cigarette and beer sales from reported gross sales. To arrive at the amount of beer sales, the auditor obtained Henry Street's beer purchases from the Division's third-party database

and marked up those purchases by the national markup percentage of 26% as reflected by a memorandum from the National Association of Convenience Stores. To arrive at cigarette sales, the auditor used the cigarette purchase report obtained from Henry Street and applied the state minimum markup of 7% after backing out prepaid cigarette tax. The auditor reasoned that because beer and cigarettes are always taxable, he would subtract those sales from the gross sales as reported on Henry Street's sales tax returns to arrive at the nontaxable percentage of gross sales. Based upon this methodology he determined a taxable ratio of 66% (i.e., beer and cigarette sales constituted 66% of Henry Street's total sales). The 66% ratio was then applied to the audited gross sales based on the occupancy index. The auditor further reasoned that the taxable ratio took into account any nontaxable food stamp sales.

15. The Division issued Notice of Determination L-040028423-8 to Henry Street on August 30, 2013 for the period of March 1, 2010 through August 31, 2010, which asserted sales tax due of \$20,123.52, plus interest, and penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi). Likewise, on October 11, 2013, the Division issued Notice L-040202015-1 to Henry Street for the period September 1, 2010 through November 30, 2012, which asserted sales tax due of \$89,449.91, plus interest, and penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi). The respective notices indicate that copies of same were also sent to the representative,

16. On September 3, 2013 and October 16, 2013, respectively, the Division issued like notices of determination (notices L-040031256-1 and L-040226612-6) to Mr. Abad, as a person responsible to collect, account for and remit sales and use taxes on behalf of Henry Street, asserting tax, interest and penalties for the same periods and in the same amounts as the notices issued to Henry Street.

17. After a conciliation conference in the Division's Bureau of Conciliation and Mediation

Services (BCMS), conciliation orders sustaining petitioners' respective notices of determination were issued on March 28, 2014.

18. In response to the conciliation orders, petitioners filed petitions with the Division of Tax Appeals and this proceeding ensued. The petitions allege that "[t]he form and manner in which the auditor used external indices is arbitrary and capricious, and not reasonably calculated to determine the amount of tax due." The petitions also alleged that the notices issued to Mr. Abad were invalid because such notices were not properly issued to Mr. Abad or to his representative. Mr. Abad claimed that he only became aware of the notices of determination issued to him subsequent to Henry Street's request for a conciliation conference with BCMS.

19. In order to prove proper issuance of notices of determination L-040031256-1 and L-040226612-6 to Mr. Abad, the Division submitted the affidavits of MaryEllen Nagengast and Bruce Peltier detailing the regular process by which the Division effects the issuance of notices of determination by delivery of the same, properly addressed and with appropriate postage affixed into the custody of the United State Postal Service (USPS) for mailing via certified mail. Included with the affidavits were copies of certified mail records (CMRs) for the block of notices issued by the Division on September 3, 2013 and October 16, 2013, including the notices of determination issued to Mr. Abad on such dates. Each CMR has been properly completed and each bear USPS date stamps confirming the articles listed thereon were mailed via certified mail on the dates claimed. Information from the USPS indicates that each of the notices was "unclaimed" by Mr. Abad and subsequently delivered to an address in Brooklyn, New York. Consistent with the USPS information, the auditor noted on September 30, 2013 a notice of determination issued to Mr. Abad was returned to his office as unclaimed.

20. At the hearing, the auditor testified he determined that Henry Street was a deli upon

the basis of his visit to Henry Street and thus he applied the index in the RIOR applicable to delis. He further testified that although there were other indexes available to use, he used the RIOR because he was familiar with it and because it is an index commonly used in his office. The 2010 RIOR is based upon financial and operating data provided by 650 members of the National Restaurant Association and members of various state restaurant associations in 2008 as compiled and analyzed by Deloitte and Touche, LLP. One hundred forty of the survey respondents were categorized as limited service restaurant with 18.6% having a sandwiches/subs/deli menu theme. The RIOR was available and was used by petitioners' representative during cross-examination of the auditor. Under cross-examination, the auditor was steadfast in his determination that Henry Street was, in fact, a deli. He further acknowledged that while Henry Street sold some nondeli items, such as fruits and vegetables, detergents, and paper products, Henry Street was primarily a deli and he made that determination when he surveyed it so that is why he used the rent index applicable to delis from the RIOR.

21. A series of pictures obtained by the auditor from the internet depict the exterior as well as portions of the interior of Henry Street. The exterior shows Henry Street's storefront windows covered with pictures of prepared food specials for items such as cheeseburgers, chicken sandwiches, chicken wings, chicken fingers, fried shrimp and assorted meal combinations of such items, with french fries and drinks. No grocery type items are visible in such storefront advertisements. Other pictures depict a large deli counter with menu board. The menu board lists various sandwiches and subs, as well as breakfast items and hot items consistent with the items advertised in the storefront windows. Deli meat was sold at \$7.99 a pound, with no differentiation as to type of meat. Additional photos depicting Henry Street's shelf areas reflect items described earlier (*see* Finding of Fact 1).

22. Mr. Abad testified at the hearing. His testimony was vague. He stated that Henry Street's sales tax returns were prepared by its accountant (whom he did not name), and that when asked he gave the accountant every document requested of him. He referred to Henry Street as a grocery store and estimated that only 25% of his sales were from the deli counter portion of the business. When questioned about the volume of fruits and vegetables Henry Street sold, his response was that only a little fruits and vegetables were sold. He stated that Henry Street is currently in the process of installing a point of sale register system.

23. Petitioners submitted bank statements into the record for the audit period. The statements reveal a significant amount of deposits made by Efund. Mr. Abad explained that these were from food stamp purchases.

24. Petitioners offered into evidence a portion of the lease agreement for Henry Street's location. Mr. Abad is identified as the tenant of the leased premises. The lease indicates that the premises are to be used by the tenant as a "supermarket only." When questioned about what kind of business the lease allowed, Mr. Abad responded: "Like a grocery deli, you know, deli counter."

25. No sales or purchase records were entered into the record.

26. At the hearing, petitioners introduced a schedule prepared by petitioners' representative that utilized the same audit methodology as that utilized by the auditor except that gross sales were computed using a rent factor applicable to food and beverage stores without assets, as taken from the 2015 Almanac of Business and Financial Ratios. Petitioners' estimate results in additional sales tax due of \$2,470.63.

27. Petitioners submitted unnumbered proposed findings of fact in narrative form as part of their post-hearing brief. Given the manner in which such proposed findings of fact are

presented, it is not possible to make rulings on same (*see* State Administrative Procedure Act § 307[1]). Moreover, many of the facts asserted are conclusory and argumentative in nature. To the extent such proposed findings of fact are supported by the record, they are included in the foregoing findings of fact.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]). Tax Law § 1135(a)(1) provides that “[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require.”

B. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed was incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . .” (Tax Law § 1138[a][1]). When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

C. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, as follows:

“To determine the adequacy of a taxpayer’s records, the Division must first

request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is 'virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit' (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), 'from which the exact amount of tax due can be determined' (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case' (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221)."

D. In this case, the record is clear that the Division made proper requests for Henry Street's books and records, and that Henry Street's books and records were inadequate for the Division to perform a detailed audit. It is equally clear that the Division was well within its right to utilize an external index to estimate sales tax due. Petitioners do not dispute these facts. The point of controversy revolves around the index actually chosen by the Division. The Division

used a rent index or occupancy index based on Henry Street being a deli. In contrast, petitioners allege Henry Street is a grocery/deli and allege that a different index should have been used. Petitioners' arguments are unpersuasive. The auditor in this case unequivocally testified that he classified Henry Street as a deli based upon his direct observation of the premises. Petitioners have presented no evidence, other than a portion of a lease agreement and petitioner Naifahmed Abad's vague testimony, to contradict the auditor's conclusion that Henry Street was properly classified as a deli. The best evidence that would establish petitioners' contention would be detailed sales records. In this case however, no sales records were presented either at audit or during the hearing. In addition, it must be stressed that Henry Street would not consent to an observation of its business operations. Having been given scant records, the auditor was entirely justified in his conclusion that Henry Street operated as a deli and in utilizing a rent factor index in estimating Henry Street's gross sales. The auditor's testimony in this regard was forthright and credible. While the portion of the lease agreement entered into evidence states that the premises was to be used as a supermarket, it is ironic that petitioner does not call itself "Henry Street Superior Supermarket" or "Henry Street Superior Market Deli," rather petitioner is called "Henry Street Superior Deli." When Mr. Abad was questioned as to what the lease allowed the premises to be used for he replied "deli counter." Stated simply, petitioners' arguments that Henry Street is not a deli are simply against the weight of the evidence. The record does not establish that the auditor's determination that Henry Street was in fact a deli was in error, or that the methodology employed in calculating petitioners' liability was flawed (*cf Matter of 33 Virginia Place*, Tax Appeals Tribunal, December 23, 2009).

E. Petitioners also argue that the RIOR should not have been utilized, but rather the 2015 Almanac of Business and Industrial Financial Ratios would be more accurate. While a different

index may have yielded different results, it has not been proven that the classification chosen by the auditor was clearly erroneous. Having produced little in the way of records during audit, petitioners cannot now be heard to complain about any resulting inexactness of the audit.

(Matter of Meyer v State Tax Commn., 61 AD2d 223, 228 [1978], lv denied 44 NY2d 645 [1978]).

F. The Division asserted penalty herein pursuant to Tax Law § 1145(a)(1)(i) and (vi). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or pay over any sales or use tax “shall” be subject to a penalty. This penalty may be canceled if the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 1145[a][1][iii]). Tax Law § 1145(a)(1)(vi) states that any person who omits from the total amount of tax required to be shown on a sales tax return an amount which is in excess of 25 percent of such total amount “shall be subject to a penalty equal to ten percent of the amount of such omission.” Like the penalties imposed under Tax Law § 1145(a)(1)(i), penalties imposed under section 1145(a)(1)(vi) must be sustained unless the failure was due to reasonable cause and not due to willful neglect.

G. Petitioners have not provided evidence or arguments sufficient to constitute reasonable cause to support abatement or cancellation of penalties. Petitioners argue that they made a good faith effort to ascertain the correct liability, and that they are currently undertaking steps to be in full compliance with their sales tax collection and remittance obligations. Petitioners’ arguments fail as the record clearly shows that petitioners ignored their obligation to keep detailed sales records (or simply chose not provide detailed records to the Division for review). Such blatant disregard cannot be countenanced. Accordingly, the imposition of penalties is sustained.

H. Finally, Mr. Abad argues that the notices of determination issued to him should be cancelled because he never received such notices and because the Division failed to send copies

of said notices to his representative. Tax Law § 1138 provides in pertinent part that “[n]otice of such determination shall be mailed to the person or persons liable for the collection or payment of the tax. A notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.” Careful review of the documents and affidavits establish the general process by which the Division issues notices, such as those herein, by delivery of the same properly addressed and with appropriate postage affixed, into the custody of the USPS and that the foregoing procedure was carried out in this case. The CMRs have been properly completed and provide highly probative proof of mailing. While the record clearly shows that Mr Abad did not receive the notices of determination since they were returned the Division as “unclaimed,” the remedy is not cancellation of the notices, but rather a tolling of the limitations period within which to file a petition or to file a request for a conciliation conference (*Matter of Ruggerite Inc. v. State Tax Commn.* 97 AD2d 634 [1983] *affd* 64 NY2d 688 [1984]). As Mr. Abad had a conciliation conference and is currently exercising his due process rights in the Division of Tax Appeals, there is no resulting prejudice.

Likewise, the auditor’s failure to have copies of the notices that were issued to Mr. Abad also mailed to the representative does not result in cancellation of the subject notices, but rather a tolling of the limitations period within which to file a petition or request a conciliation conference (*Matter of Multi Trucking, Inc.*, Tax Appeals Tribunal, October 6, 1988). As Mr. Abad had a conciliation conference and is currently exercising his due process rights in the Division of Tax Appeals, there is no ensuing prejudice in this case.

I. The petitions of Henry Street Superior Deli Corporation and Naifahamed Abad are denied and the notices of determination issued on August 30, 2013, September 3, 2013, October 11, 2013 and October 16, 2013 are sustained.

DATED: Albany, New York
March 17, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE